

STATE OF IOWA

BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

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MISSOURI VALLEY POLICE OFFICER'S)
ASSOCIATION, LOCAL 90,)
Complainant,)
and)
AUSTIN O'BRIEN, CHIEF OF POLICE;)
MISSOURI VALLEY POLICE DEPARTMENT;)
and CITY OF MISSOURI VALLEY, IOWA,)
Respondents.)

RELATIONS BOARD

CASE NO. 4467

PROPOSED DECISION AND ORDER

Charles E. Boldt, Administrative Law Judge. On May 20, 1991, the Missouri Valley Police Officer's Association, Local 90 (Association) filed a prohibited practice complaint pursuant to Section 20.11 of the IOWA CODE (1989),¹ with the Public Employment Relations Board (Board). The complaint alleges that Missouri Valley Police Chief Austin O'Brien (O'Brien), the Missouri Valley Police Department (MVPD), and the City of Missouri Valley, Iowa (City), [in aggregate referred to as Respondents] violated Sections 20.10(2)(a), (b), (c) and (d) of the Public Employment Relations Act, Chapter 20, IOWA CODE (Act) by suspending indefinitely Officer Michael W. Messerschmidt (MWM). The complaint alleges that the suspension with pay was motivated by MWM's protected activity surrounding the organization of the Association and was an attempt by Respondents to subvert employee rights.

¹All references to the Iowa Code will be to the 1989 Code unless otherwise specified.

Respondents filed their answer to the prohibited practice complaint on June 6, 1991, in which the Respondents deny the allegations contained in the complaint and assert an affirmative defense that the purpose of the suspension was to further investigate citizen complaints brought against MWM.

A hearing was conducted before me at Missouri Valley, Iowa on October 17, 1991, where the Association was represented by Dennis M. McElwain and the Respondents were represented by Derrick R. Franck. Both parties had full opportunity to present testimony and evidence at hearing and both parties filed post-hearing briefs by December 2, 1991. Based on the entire record in this case, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

At hearing the parties stipulated that the City is a public employer and the Association is the certified employee organization pursuant to the Act. The Association urged, and there was no objection by the City, that this Administrative Law Judge should take official notice of PERB Case No. 4388 in which the Association sought and received unit determination and bargaining representative certification.

Missouri Valley is a small community in western Iowa located at the junction of U.S. Highway 30 and Interstate Highway 29. The City has a mayor/city council form of government. The City's Police Department is comprised of the Chief of Police, Austin O'Brien; one sergeant, Randy Jensen (Jensen); three patrol officers, Mike Messerschmidt (MWM); Marilyn Smith (Smith) and Dondi

Arrick (Arrick), and an unknown number of part-time reserve officers. O'Brien reports to the Mayor, Gerry LaFarge (Mayor or LaFarge) who then reports to the city council.

O'Brien has been chief of police for the City since May 15, 1990. Prior to his employment for the City, O'Brien had held a similar position in another municipality. O'Brien's predecessor was Chief Darrel Cates (Cates). Cates had been the City's police chief for approximately 12 years. He failed to be reappointed as chief by the city council in January, 1990. During the period from January, 1990 to May, 1990, Smith filled the position of acting chief of police.

At the time of hearing, Jensen had been with the MVPD for approximately 11 years; Smith approximately 12 years and Arrick approximately 2 years. MWM started with the MVPD as a part-time reserve officer in mid-1986. In November, 1987, MWM became a full-time officer with the MVPD. He attended the Iowa Law Enforcement Academy in Johnston, Iowa,² and completed the Academy's ten week course of instruction and testing.

During MWM's employment under Chief Cates, MWM was the subject of some citizen complaints. Cates response to these complaints was usually informal and consisted of a "chewing out". On December 29, 1989, Cates terminated the employment of MWM with the MVPD. The

²There is some confusion in the testimony regarding when MWM attended the Academy. Testimony indicates the training and testing post-dated MWM's hire as a full-time officer and that the Minnesota Multiphasic Personality Inventory (MMPI) was administered at the Academy. The testing date for the MMPI was 2/16/88 (Respondents' Exhibit 11).

grounds for termination involved MWM shooting at a dog within the City limits resulting in pellets striking a private residence. MWM did not report the incident. On January 2, 1990, MWM appealed his termination to Acting Chief Smith. Smith reinstated MWM on January 6, 1990 with a written reprimand and a 60 day probationary period.³

Smith testified that during her tenure as Acting Chief, January to May, 1990, she did not always agree with the manner in which MWM had handled things, but that she had not had occasion to discipline him other than the reinstated discipline mentioned above.

O'Brien took office as the MVPD Chief May 15, 1990. Testimony indicates that O'Brien reviewed the personnel files of the MVPD officers and spent time getting to know them. There were no incidents of conflict between MWM and O'Brien until October, 1990.

In October, 1990, a fight took place at the Winchester residence in Missouri Valley between MWM's nephew and Brett Winchester. Both youths were approximately 15 years of age at the time. This struggle was pre-arranged by the boys and was attended by several area boys. At the end of this fight, Brett's older brother, Doug, insisted that MWM's nephew leave. Doug Winchester testified that MWM's nephew came at Doug and that Doug then struck MWM's nephew in the face. MWM's nephew and observers of the first confrontation then left. Approximately two to three hours later, MWM arrived at the Winchester home. He was seeking his nephew's wallet. The wallet was located and given to MWM. Linda

³Respondent's Exhibit 6, pp. 1-4.

Winchester, mother of Doug and Brett, had been out for a walk when she saw the patrol car by the house. She returned to the house while MWM was still there. Linda testified that MWM was "yelling and screaming." She then asked MWM if there could be a different officer called since there was a family tie between MWM and one of the disputants. Doug Winchester's testimony does not indicate anything unprofessional from MWM until Linda Winchester asked for a different officer, at which time MWM uttered a derogatory remark. MWM told the Winchesters that assault charges would be filed. He then left the Winchester residence.

MWM reported the Winchester incident on October 2, 1990, and filed a complaint and affidavit with the Harrison County District Court on October 3, 1990 on behalf of MWM's nephew and the nephew's parents. Linda Winchester called City Councilwoman Dorothy Palmer after the charges were received in the mail, approximately one week after the fight. Councilwoman Palmer (Palmer) called O'Brien and O'Brien went and talked to the Winchesters. O'Brien told the Winchesters that the charges would be dropped. O'Brien then talked to MWM and told him he should drop the charges. The charges were not dropped. In an agreement with the magistrate, the charges were held for six months and, barring further incident, the charges would be dismissed. The charges were subsequently dismissed.

Linda Winchester relates in testimony how MWM would drive by the Winchester residence 10 to 15 times a day and follow Doug whenever he drove. Linda testified that her husband was usually the one to see MWM drive by. Mr. Winchester is a stroke victim who

cannot speak nor write and did not testify. Doug Winchester testified that MWM followed him, "it seemed like two or three times a week..."

The MVPD has an annual evaluation system wherein the Chief evaluates all officers and reports those evaluations to the City Council during their first council meeting of the calendar year. On January 2, 1991, O'Brien reported the evaluations of his subordinate officers. There is no numerical rating scale. MWM received very positive remarks including the statement, "Mike supersedes all other officers..." (the remainder of this sentence is illegible on Exhibit A).

On January 20, 1991, the Association had its first formal meeting. Informal discussion predated this meeting back to November, 1990, when MWM had discussed organizing with a police officer from Carter Lake, Iowa. The January 20, 1991 meeting was conducted at the MVPD. O'Brien was also present at the police department but did not participate in the meeting. O'Brien did comment to the assemblage that he thought it was about time the officers organized. At this meeting, MWM was elected president of the newly formed association. It was further determined that a meeting should be set up with a representative from the International Union of Police Associations (IUPA).

On January 21, 1991, O'Brien issued a memorandum (Complainant's Exhibit B) to the officers of the MVPD, the city council, the mayor, the city clerk and the county sheriff. In the memo, O'Brien relates his interview experiences with the city

council and, specifically, his responses to the city council to questions relating to MVPD personnel dealing directly with city council members and relating problems within the MVPD and the City to people outside the department. O'Brien's response to the city council had been that such activity was a serious problem and if the problem could not be annulled, the source of the problem "must be severed from the existing body." O'Brien iterates eight rumors circulated by members of the MVPD, members of other departments, and families and friends of those members. O'Brien reiterates that rumors cannot continue to exist. He then pledges to "start afresh" and asks that all "malice and indifferences" be set aside and "not letting it be taken up or mentioned again."

Several events pertinent to this case took place on January 23, 1991. Members of the Association met with the IUPA representative, Pete Sorich, at the Happy Chief Restaurant in Missouri Valley. During this meeting documents affiliating the Association with IUPA were signed and other administrative details of the organizing effort were attended to.

Following the morning meeting with IUPA on January 23, MWM and Jensen, travelling in separate vehicles, went to City Hall to pick up their pay checks at the City Clerk's office. Upon leaving the Clerk's office, MWM and Jensen were intercepted by O'Brien and asked to step into his office. Present in the office were Mayor LaFarge and Councilwoman Bonnie Shannon (Shannon). After the exchange of amenities, Shannon and LaFarge challenged Jensen and

MWM about joining a union and wanted to know why. The meeting was characterized in testimony as hostile and tense.

During this same day, Arrick was terminated, then suspended. The precise details of this disciplinary action were not put into the record. It is believed that this action happened after the discussion involving MWM, Jensen, Shannon, LaFarge, and O'Brien.

On January 24, 1991, MWM wrote a memorandum to O'Brien on IUPA letterhead and signed the memo as President of the Association. The memo challenges O'Brien's actions from the previous day regarding the discipline of Arrick. The memo gives O'Brien three days to respond to Arrick in writing while indicating intent to grieve the discipline and the Association's support of Arrick.

On January 25, 1991, Linda Winchester wrote a letter to Councilwoman Dorothy Palmer.⁴ In this letter she complained of the events during the October, 1990 incident. Linda Winchester did not comment concerning any ongoing harassment by MWM in this letter.⁵

The Association filed a combined petition for unit determination and bargaining representative certification on

⁴Linda Winchester testified that she delayed complaining about MWM because she was afraid of reprisal from MWM. She also testified that she wrote this letter in March or April, 1991. The letter is dated Friday the 25th. The only Friday the 25th between October, 1990 and April, 1991 was January 25, 1991.

⁵Linda Winchester's testimony regarding the harassment is inconsistent with her son's testimony and is not corroborated. Her testimony regarding the assault by Doug Winchester is similarly inconsistent. The many inconsistencies in her testimony bring her entire testimony into doubt of its veracity.

February 9, 1991. This petition was subsequently docketed as PERB Case No. 4388.

On March 5, 1991, MWM attended a city council meeting wherein he read an introductory letter of the Association to the city council. The letter is a general statement of intent and purpose of the Association and identifies the Association officers as President MWM and Secretary-Treasurer Smith.

A stipulation of the unit to be determined by the Association's petition was filed with PERB on March 11, 1991. The petition identifies the positions of patrolman and sergeant/patrolman as included in the unit and the Chief of Police as excluded. PERB gave tentative approval of this stipulated unit.

On March 12, 1991, MWM attended another city council meeting. City council meetings are regularly scheduled on Tuesdays. MWM had begun his regular attendance at council meetings in his capacity of President of the Association. Discussed and adopted at this meeting were work rules governing the use of police vehicles beyond the city limits of Missouri Valley.

On March 17, 1991 a series of events occurred. The initial event involved a fight at a Missouri Valley tavern. Responding to the police call were Arrick and Reserve Officer Miller in one car and MWM in the other car. MWM left a prisoner at the MVPD to respond to this call. The combatants were separated and Earl Jensen, purportedly the victim of the assault, was sent with Miller to wait by Arrick's patrol car. Earl Jensen was excited and angry and did not wish to remain by the patrol car but wanted to return

to the crowd which had formed. Miller testified that he had to return Earl Jensen to the patrol car several times before MWM intervened. MWM insisted that Earl Jensen get into the back of the patrol car. Earl Jensen resisted and Arrick assisted MWM in subduing him and placing him in the patrol car's back seat in handcuffs. Kym Bigelow (Bigelow) was present during this episode and was harassing MWM and Arrick for their treatment of Earl Jensen. Bigelow was also subsequently arrested. The original antagonists were also arrested. During these arrests, Earl Jensen was kicking the door of the patrol car in which he was confined.

The officers were preparing to transport their prisoners to the county jail in Logan, Iowa when they received a call concerning a fight at a Missouri Valley trailer court. Both cars responded to the scene, as did a Harrison County Sheriff's Deputy. The MVPD officers took their prisoners with them on this call. The MVPD officers were confronted with a railroad crossing where the crossing barriers were down and the lights were flashing. Both MVPD patrol cars proceeded with caution to drive around the control barriers, cross the tracks, and proceed to the trailer park. The trailer park incident proved inconsequential and, after some shuffling of prisoners, MWM and Miller transported the prisoners to Logan while Arrick remained in Missouri Valley.

Earl Jensen called O'Brien following this incident and complained of MWM's treatment during the Jensen/Bigelow arrest. Earl Jensen compared this arrest with the publicized incident where Rodney King was videotaped being beaten by Los Angeles, California

police officers. O'Brien investigated the complaint with Arrick and Miller, neither officer considered the incident offensive nor an excessive use of force. O'Brien took no further action.

On March 19, 1991, MWM attended another city council meeting where he questioned the council on the cost of insurance. On April 2, 1991, MWM questioned the council about personnel policies and the status of the MVPD police cars. During this latter discussion on April 2, 1991, City Council member Dorothy Thomsen commented that MWM didn't seem to like his job.

PERB issued a Public Notice of Proposed Decision on March 22, 1991. The notice provides opportunity to object to the formulation of the bargaining unit as stipulated by the parties. The notice provided that objections should be filed by 4:30 p.m., April 2, 1991. On April 3, 1991, the unit was determined and an election was ordered. A mail ballot election was established with votes to be counted on April 22, 1991.

On or before April 10, 1991, Earl Jensen again contacted O'Brien to see what had been done about his verbal complaint against MWM. On April 10, 1991, Earl Jensen filed a formal written complaint concerning the March 17, 1991 incident. Ostensibly, Bigelow also filed a written complaint on April 10, 1991, but her signature on the complaint is dated April 14, 1991.

O'Brien testified that he got the January 25, 1991 letter from Linda Winchester to Councilwoman Palmer given to him by Palmer on April 11, 1991. Palmer identified the letter as important.

On April 12, 1991, Doug Winchester filed a complaint against MWM regarding an incident at Logan Courthouse where MWM allegedly threatened Doug. On this same date, Linda Winchester filed a written complaint against MWM from events that occurred in October, 1990.

On April 13, 1991, MWM was involved in an arrest of Mark Collins. While at the Logan Sheriff's Department, Collins was resisting going to the booking room. MWM pushed Collins away from him into the booking room. Collins lost his footing, struck his head during the fall, and briefly lost consciousness. Collins was inebriated at the time. This incident came to the attention of O'Brien through Harrison County Sheriff Merle Sass and Deputy Pat Sears.

On April 22, 1991, the ballots for representative certification were counted resulting in a four to zero tally in favor of the Association.

On April 23, 1991, MWM was asked to respond to a call from a Department of Human Services (DHS) employee. MWM was to check on a threatened suicide and assault situation at a Missouri Valley residence and telephone the DHS employee. MWM checked the situation, assessed it as under control, and asked the husband to call the DHS employee. This prompted a complaint from the DHS employee that her private telephone number had been given out instead of the officer calling her back as requested.

On April 25, 1991, O'Brien interviewed Missouri Valley resident Paul Pierce concerning an incident in 1988. O'Brien wrote up a statement and Paul Pierce signed it.

On April 27, 1991, MWM arrested Michael Wallis (Wallis) and Victoria Bernabei (Bernabei). MWM was called to the same tavern that had been the scene of the Earl Jensen situation. The call was that a man (Wallis) was beating a woman (Bernabei) in the parking lot of the tavern. There is conflicting testimony from Wallis and Bernabei concerning events preceding the police call. Both testify to drinking prior to going to Missouri Valley. Wallis and Bernabei are boyfriend and girlfriend. A third person was with Bernabei and Wallis, a male named Bruce. Bruce and Wallis were driving their Harley Davidson motorcycles with Bernabei riding behind Wallis on his. Neither Wallis nor Bernabei could remember precisely what time they got to Missouri Valley. Bernabei testified they drank more in Missouri Valley, Wallis testified they did not.

An argument ensued between Wallis and Bernabei. Bernabei went to the parking lot and pushed over both motorcycles. Wallis proceeded to slap Bernabei around and a waitress at the tavern called the police. MWM responded to the call and observed Bernabei on the ground trying to defend herself from Wallis. Wallis was placed under arrest, handcuffed, and placed in the back seat of the patrol car. Apparently, Bruce and Bernabei were trying to talk MWM out of arresting Wallis. Bernabei was persistent and subsequently began kicking the patrol car and attempted to dislodge the patrol car's hood ornament. MWM pursued Bernabei around the car several

times before catching up to her. Bernabei was placed in the back of the patrol car with Wallis. Bernabei and Wallis both testified that Bernabei was handcuffed before being placed in the car. MWM testified that he did not handcuff Bernabei since she calmed down at the prospect of being with her boyfriend, Wallis. Bruce did not testify.

On the way out of Missouri Valley toward Logan, Bernabei again became agitated. MWM testified that she was hitting the cage that divides the back seat from the front seat and kicking the back of the front seat. Bernabei concurs that she was hitting the cage with her shoulder. MWM stopped the car and removed Bernabei from the back seat. MWM indicates that Bernabei kicked him in the groin area twice and that she struggled throughout this encounter. MWM states that he half tackled and half fell upon Bernabei on the ground as a result of her struggles. Bernabei characterizes the episode as one in which MWM threw her to the ground while she was handcuffed behind the back.

Bernabei received a cut lip and knee during this struggle. MWM took her to the hospital to have her injuries tended. Wallis and Bernabei were then transported to jail.

Bernabei and Wallis were released from jail on Sunday, April 28, 1991. The pair went looking for someone to receive a complaint they wished to lodge against MWM. No one was present at the MVPD. They then went to O'Brien's home. O'Brien was not at home, but Wallis and Bernabei spoke with O'Brien's wife. They did not reveal the nature of their complaint. Wallis and Bernabei did not speak

directly to O'Brien for one to two weeks after this incident. O'Brien testified that this incident was part of the consideration in deciding to suspend MWM, but O'Brien was unable to specify knowledge of this incident prior to the suspension.

On April 29, 1991, O'Brien, who went to the MVPD on his day off, placed MWM on suspension with pay for an indefinite period citing as his reason the pending investigation of several citizen's complaints. O'Brien removed himself from any final determination in the matter stating, ". . . [I]t will therefore be totally left up to the Mayor and City Council to be the final judge, as to what final course of action should be taken." The letter of suspension lists six areas of complaint: 1) Unnecessary Arrest, 2) Unnecessary Use of force, 3) Aggressive force, 4) Conduct unbecoming an officer, 5) Aggressive and intimidating behavior, and, 6) Failure to exercise good judgement pertaining to prisoners.

On May 6, 1991, MWM was given a psychological evaluation at the request of Missouri Valley. The results of this evaluation were substantially equivalent of the results of the previous MMPI that MWM had taken at the Law Enforcement Academy. The record does not reflect any investigation beyond this testing. MWM's employment with the City of Missouri Valley was terminated approximately three weeks following the imposition of the suspension.

Following the filing of the Employee Organization Annual Report and the Registration Report with PERB, the Association was certified on June 3, 1991.

CONCLUSIONS OF LAW

The first issue before this ALJ is determination of the issue.

The Association first framed the issue in its complaint as:

In sum, it is contended that Officer Messerschmidt's suspension is motivated by Respondent's effort to subvert employees' rights guaranteed by Iowa Code Chapter 20, and specifically that Respondent has violated I.C. §20.10(2)(a)(b)(c) and (d).

At hearing, some testimony was received concerning MWM's discharge, but there was very little testimony or evidence regarding the investigation during MWM's suspension. There was no testimony from the Mayor or City Council which, according to the suspension letter, would make the final determination. There was no testimony or evidence to the precise date of the discharge. Nor was there testimony or evidence of the specific reasons for discharge.

In its brief, the Association initially reiterates the issue as being the suspension that preceded the discharge. Later in their brief, in arguing its legal theory and in its requested remedy, the Association references the discharge.

Counsel for Respondent argues in brief that the paid suspension is the sole issue before this ALJ.

I have carefully reviewed PERB's recent ruling on objections to an election⁶ in which the Board reviewed a motion to amend the pleadings to conform to the proof. While there is no such motion in the instant case, there exists an implication that MWM's discharge is subsumed in the complaint. I conclude that, in the absence of evidence and testimony critical to a determination that

⁶Mt. Pleasant Utilities, 91 PERB 4516.

the discharge has been fully and fairly adjudicated before me and in the absence of a motion to amend the pleadings to incorporate the discharge, the issue before me is as stated in the Notice of Hearing, to wit:

Did the above-named Respondents commit prohibited practices pursuant to Sections 20.10(2)(a),(b),(c) and (d) of the Act by suspending Officer Michael W. Messerschmidt?

Sections 20.10(2)(a),(b),(c) and (d) of the Act provide:

2. It shall be a prohibited practice for a public employer or the employer's designated representative willfully to:

a. Interfere with, restrain or coerce public employees in the exercise of rights granted by the chapter.

b. Dominate or interfere in the administration of any employee organization.

c. Encourage or discourage membership in any employee organization, committee or association by discriminating in hiring, tenure, or other terms or conditions of employment.

d. Discharge or discriminate against a public employee because the employee has filed an affidavit, petition or complaint or given any information or testimony under this chapter, or because the employee has formed, joined or chosen to be represented by any employee organization.

Employee rights are set forth in Section 20.8 as follows:

Public employees shall have the right to:

1. Organize, or form, join, or assist any employee organization.

2. Negotiate collectively through representatives of their own choosing.

3. Engage in other concerted activities for the purpose of collective bargaining or other

mutual aid or protection insofar as any such activity is not prohibited by this chapter or any other law of the state.

4. Refuse to join or participate in the activities of employee organization, including the payment of any dues, fees, or assessments or service fees of any type.

Both parties cite Cerro Gordo County⁷ as the governing legal theory in the instant case. Cerro Gordo County references Wright Line⁸ and Transportation Management Corp.,⁹ in setting forth the burden of proof where dual motives, legal and illegal, are alleged in taking adverse action.

Under the dual-motive test the employee must establish a prima facie case that the employee's protected conduct (i.e., union activity) was a "substantial or motivating factor in the discharge." The burden then shifts to the employer to demonstrate by a preponderance of the evidence the discharge would have taken place even in the absence of the protected conduct. The shifting burden requires the employer to make out what is actually an affirmative defense: the discharge would have occurred in any event and was a lawful discharge for valid reasons. (emphasis in original). (cites omitted).¹⁰

The Association argues that it has met its burden of proof in establishing the three elements of a prima facie case: the existence of protected activity, the employer's knowledge of the protected activity, and anti-union animus. The Respondents do not

⁷Cerro Gordo County v. Public Employment Relations Board, 395 N.W.2d 672 (Iowa App. 1986).

⁸Wright Line, A Division of Wright Line, Inc., 251 NLRB 1053 (1980), enf'd., 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

⁹Transportation Management Corp., 113 LRRM 2857.

¹⁰Cerro Gordo County, supra at 676.

dispute that MWM was engaged in protected activity nor do they dispute the employer's knowledge of that activity. This case then centers on whether anti-union animus was demonstrated as a motivating factor in the suspension of Mr. Messerschmidt.

The Association cites several cases¹¹ to support its contention that the timing of the suspension and the timing of statements made by representatives of the employer against the union are indicative of anti-union animus. Specifically, the Association references the January 23, 1991 confrontation involving MWM, Jensen, LaFarge, O'Brien, and Shannon. Additionally, the Association refers to the comment from Councilwoman Thomsen at the April 2, 1991 City Council meeting to the effect that MWM didn't seem to like his job very well.

Counsel for the Respondents rebuts the assertion of anti-union animus by pointing out that Chief O'Brien, the individual responsible for levying the suspension, is not alleged to have made any anti-union comments at the January 23 meeting or at any council meetings. In fact, the one comment regarding the Association made by O'Brien on January 20 was pro-union. Respondents, in brief, cite to The Developing Labor Law,¹² that timing of the employer's action, the pretextual nature of its asserted motivations, or shifting justifications for discharge given by the employer are criteria to be examined in determining the existence of anti-union

¹¹LeMars Community School District, 82 H.O. 2188; Des Moines County, 89 PERB 3494; City of Marion, 82 H.O. 1757.

¹²Morris, Charles J., The Developing Labor Law, Second Edition, Fifth Supplement (1982-1988), p. 107.

animus. Respondents argue that "the only circumstance that even arguably applies to show union animus is the timing of the suspension."¹³ Respondents also state that the asserted motives for the suspension are neither shifting or pretextual. The complaints received from the Winchesters, the Jensen/Bigelow complaints, the Collins incident, the Wallis/Bernabei incident, and the complaint raised by the DHS employee are argued as legal motive for the suspension. The second MMPI which was given after the suspension is insinuated as evidence of probable recurrence of the aggressive behavior of which MWM is accused. . This second MMPI occurred after the issuance of the suspension and is not relevant to the instant case.

Several facts are germane to a determination whether the Association has met its burden of proof establishing anti-union animus. The first meeting to organize the Association occurred January 20, 1991 in the presence of Chief O'Brien. While it was testified to that O'Brien made an encouraging comment at that meeting, the very next day he issued a memo which threatens termination to anyone who takes MVPD problems outside the department. Included in this rather broad threat is the matter of officers taking departmental matters directly to the city council. On January 23, 1991, Mayor LaFarge and Councilwoman Shannon expressed their antagonism toward the formation of a union. At the April 2, 1991 city council meeting, Councilwoman Thomsen made a comment to MWM that, since he was acting in his capacity as

¹³Respondent's brief at 12.

President of the Association, carried the implication of threat against the Association. By the April 2, 1991 city council meeting, MWM had established his practice of attending all city council meetings and providing Association input into matters under discussion without first seeking approval of Chief O'Brien. This behavior by MWM is the same as that described by O'Brien as a termination offense in his memo of January 21, 1991.

The letter from Mrs. Winchester to Councilwoman Palmer in late January was not given to Chief O'Brien until April 11, 1991. No explanation was given for this delay or the resurrection of this dead issue. There was no complaint in the Collins incident. There is no conclusive evidence that Chief O'Brien was aware of the substance of the Wallis/Bernabei incident before the decision to levy the suspension; as such, I cannot conclude that the Wallis/Bernabei incident is relevant to the suspension.

O'Brien's threatening memo did not stop organizing efforts. A harangue by LaFarge and Shannon failed to halt the organizing effort. Thomsen's veiled threat on April 2, 1991, did not deter the organizing effort. In fact, during these attempts at deterrence, MWM increased his protected activity by persistently attending city council meetings and providing input into matters dealing with the MVPD. Immediately following the city council's April 9, 1991 meeting, the Jensen/Bigelow incident was reactivated following an initial decision by O'Brien to do nothing. The Winchester incidents were resurrected by Palmer after months of inactivity. The Pierce incident was reactivated from 1988.

It is clear that members of the city council were anti-union in sentiment. This sentiment by the city council and its apparent lack of effect on MWM, were communicated to and demonstrated in front of the Chief of Police. I conclude that Chief O'Brien, as a relatively new employee of the Council, was influenced by the overt manifestations of anti-union animus, and acted to eliminate the source of irritation, MWM. I further conclude that the Association has met its burden of proof establishing the existence of anti-union animus, and that anti-union animus was a motivating factor in suspending MWM on April 29, 1991.

Having concluded that the first prong of the Wright Line test has been established by the Association, the burden shifts to the employer to raise an affirmative defense that the suspension pending investigation of citizen's complaints would have occurred regardless of the anti-union animus. In consideration of this facet of Wright Line, it is necessary to look at the citizen's complaints. It is not necessary for me to determine the validity of those complaints, only whether they constituted grounds for the suspension.

The Association urges review of the timing of the complaints with respect to the events which were the subject of the complaint. The Association also urges analysis of O'Brien's investigation of the complaints. The Association's view of O'Brien's investigation points out that in the Jensen/Bigelow incident, Arrick was involved in all allegations of wrong-doing surrounding the incident except leaving a prisoner at the police station. Officer Arrick was not

disciplined for his acts during this incident. Only Officer Messerschmidt was singled out. The Association argues that O'Brien's conclusions were contrary to the reports and conclusions of other officers at the scene.

In turning to the Winchester complaints, the Association points out that Linda Winchester's testimony was not consistent with her written complaint. The Association refers to assertions made by Linda Winchester in testimony as fabrications. Her fear of reprisal as a reason for not filing the complaint sooner is challenged as a fabrication. The "harassment" by MWM driving past the Winchester residence is also challenged as a fabrication. That Chief O'Brien had prior knowledge of the Winchester incident is also pointed to as evidence of a pretextual motive.

The Association points out that no complaint was filed in the Collins incident by Collins, Sheriff's Deputy Sears or Sheriff Sass. The Paul Pierce complaint was nearly three years old and was solicited by O'Brien. The verbal complaint by the DHS worker was not addressed by the Association in challenging O'Brien's investigation as pretextual. I have addressed above the invalidity of the Wallis/Bernabei incident as a determining factor in levying the suspension.

Respondents argue that even if the burden shifts to the City, the suspension would have occurred in any event. In support of this contention, Respondents point to a document in MWM's personnel file which was written by Sergeant Jensen which indicates harassment of community members by MWM. In addition, Respondents

point to the seriousness of allegations of use of unnecessary force as sufficient for a suspension to investigate those allegations.

The initial incident giving rise to complaints about MWM was in 1988, the Pierce incident. This incident was addressed by Chief Cates at the time and does not support a suspension for investigation.

Chronologically, the second incident occurred October 2, 1990 at the Winchester residence. First awareness of this incident came to the City's attention in October, 1990. The issue was deemed resolved by Chief O'Brien. In January or early February, 1991, Linda Winchester's letter would have been received by the city council. No action was taken until April 11, 1991 when Chief O'Brien was given the letter and told that it was important. The long delay from incident to letter and letter receipt to its conveyance to O'Brien indicate that this incident was insufficient to compel a suspension pending its investigation.

The multiple allegations of wrong-doing surrounding the Jensen/Bigelow arrest occurred were initially brought to Chief O'Brien's attention by a telephone call from Earl Jensen. Chief O'Brien initially took no action. Ostensibly, a second call from Jensen prompted O'Brien to investigate. This investigation occurred before the suspension. Testimony of Officers Arrick and Miller indicate that both were involved in the incident, yet no adverse action was taken against either of them. There was no explanation for this discriminatory treatment of MWM. These officers-at-the-scene conclude that no unnecessary force was used.

The investigation did not suggest that further investigation was necessary nor that a suspension to protect the public should be levied. Even the spread of 19 days from the receipt of this written complaint and the initiation of the suspension belies the need of such a suspension arising from this complaint.

The Collins incident occurred 16 days before the suspension. No complaint was filed in this incident. Investigation of this incident ended with a statement from Deputy Sears dated 12 days before the suspension. This incident also did not prompt a suspension pending its investigation.

The April 23, 1991 incident with the DHS employee is at worst an allegation of poor judgement in handling a request which was not a mandate. It was not of sufficient magnitude to call for a suspension pending its investigation.

As indicated previously, the Wallis/Bernabei incident is not deemed relevant to the suspension. While Chief O'Brien testified that it was relevant, the logistics of a Saturday night arrest, O'Brien's unavailability on Sunday, no evidence of discourse with Wallis, Bernabei or MWM on Monday prior to the suspension, all militate against this incident being a motivating factor in the decision to suspend.

It remains whether these incidents were sufficient, in aggregate, to elicit a suspension pending their further investigation. Two elements overshadow Chief O'Brien's actions. The first is his failure to question MWM regarding these incidents to ascertain if details were absent from MWM's police reports.

Would Chief O'Brien investigate any matter normally without questioning the accused in depth? Why did Chief O'Brien remove himself from the final determination and outcome of the matter? Neither of these questions is adequately answered in the record.

I cannot conclude that the incidents identified as motivation for the suspension of MWM, either singularly or in aggregate, were motivation to suspend MWM pending investigation. In reaching this conclusion, I find that Respondents have failed to show that the adverse action would have occurred regardless of MWM's protected activity.

I conclude that Respondents, in suspending MWM from duty with pay on April 29, 1991 for an indefinite period, did so using pretextual motives and, in fact, were motivated in this course of action by anti-union animus. By this action, Respondents did willfully interfere with the exercise of protected rights, interfere in the administration of the Association, discourage by discriminatory practices involvement with the Association, and discriminate against MWM for his activities on behalf of the Association. This activity by Respondents is violative of Sections 20.10(2)(a),(b),(c), and (d) of the Act.

The suspension of Officer Messerschmidt was a paid suspension leaving no appropriate economic remedy for him.

Accordingly, I hereby issue the following recommended:

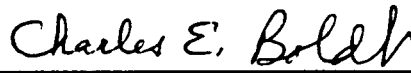
ORDER

IT IS THEREFORE ORDERED that to remedy its violation of Sections 20.10(2)(a),(b),(c), and (d), Iowa Code (1989), the City

of Missouri Valley, Iowa, the Missouri Valley Police Department and Austin O'Brien, Chief of Police shall cease and desist from any continuing or further violations of the Public Employment Relations Act.

IT IS FURTHER ORDERED that the City of Missouri Valley, Iowa, shall post copies of the attached Notice to Employees, in places customarily utilized for the posting of notices to employees represented by the Missouri Valley Police Officer's Association, Local 90, for a period of not less than thirty (30) days.

DATED at Des Moines, Iowa this 22nd day of January, 1992.



CHARLES E. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE TO EMPLOYEES

Posted Pursuant to a Decision of the Public Employment Relations Board

An Administrative Law Judge of the Public Employment Relations Board has determined that the City of Missouri Valley, Iowa, the Missouri Valley Police Department, and Austin O'Brien, Chief of Police (Respondents) have violated Sections 20.10(2)(a), (b), (c), and (d) of the Public Employment Relations Act (the Act), Chapter 20, Iowa Code (1989), by willfully interfering in the exercise of protected rights of public employees, interfering in the administration of the Missouri Valley Police Officer's Association, Local 90 (Association), discouraging by discriminatory practices involvement with the Association, and discrimination against Officer Michael W. Messerschmidt for his activities on behalf of the Association when Officer Messerschmidt was suspended indefinitely on April 29, 1991.

The sections of the Act found to have been violated provide:

2. It shall be a prohibited practice for a public employer or the employer's designated representative willfully to:

- a. Interfere with, restrain or coerce public employees in the exercise of rights granted by the chapter.
- b. Dominate or interfere in the administration of any employee organization.
- c. Encourage or discourage membership in any employee organization, committee or association by discriminating in hiring, tenure, or other terms or conditions of employment.
- d. Discharge or discriminate against a public employee because the employee has filed an affidavit, petition or complaint or given any information or testimony under this chapter, or because the employee has formed, joined or chosen to be represented by any employee organization.

To remedy the violations of the Act, the Respondents have been ordered to cease and desist from continuing or future violations and to post this Notice to Employees.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this Notice or compliance with its provisions may be directed to the Public Employment Relations Board at (515) 281-4414.